IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 166 OF 2004

Vijay Hiralal Jaiswal,]
Indian Inhabitant, Sole Proprietor of]
M/s. Three Circles, Kanta Nivas, D.J. Road,]
Vile Parle (West), Mumbai 400 056] ...Applicant

Versus

1. Managing Director]
Indian Airlines, New Delhi]

2. The Senior Manager (Civil),]
Indian Airlines Ltd., N.E.C., Sahar,]
Vile Parle East, Mumbai 400 099] ...Respondents

Ms. Krishna Tanna instructed by M/s. Lex Consultants for the Applicant

Mr. P.N. Mody instructed by M/s. Mulla & Mulla & Craigie Blunt & Caroe for the Respondents.

CORAM: **DALVEER BHANDARI, C.J.**

DATE: APRIL 29, 2005.

JUDGMENT:-

1. The brief facts necessary to dispose of this Arbitration Application are recapitulated as under:-

   The applicant submitted the tender for the construction of Engine Run-up Bay at NEC, construction of New Apron at NEC Sahar at Mumbai for the value of Rs.1,53,90,189.75. Respondent No. 1 accepted the tender on 22nd February, 1997. The applicant duly signed the contract documents and forwarded the same to the respondents. The applicant required some more time to complete the work and the same was extended by the respondents without any penal action. The final bill was jointly made with the consultants and submitted for payment on 22nd June, 2001.

2. The applicant requested the Regional Director (Works) to ensure that the payment of the final bill be made to the applicant. A reminder was also sent on 28th May, 2003.

3. According to the applicant, respondent No. 2, Senior Manager (Civil),

Indian Airlines Ltd., addressed a letter on 9th June, 2003 and asked the applicant to submit certain documents pertaining to order/letter from the Regional Director (W), advising the applicant to execute some extra/additional work over and above the contract amount in variation of 10% of the tender cost.

4. The applicant, vide his correspondence dated 16th June, 2003, replied to the said query raised by respondent No. 2 and again requested respondent No. 2 to release the final bill. Despite that, the final bill of the applicant has not been released; and the applicant was left with no option but to invoke the provision of Arbitration Clause/Dispute Settlement Clause No. 57 of the contract, and called upon respondent No. 1, who is the named arbitrator in dispute settlement clause No. 57, to enter upon reference within 30 days.

5. It is alleged by the applicant that the respondents did not pay the final bill and refunded the Security Deposit of the applicant.

6. The applicant has sent a letter dated 17th January, 2004 to the Managing Director, Indian Airlines, in which it is requested that the

unpaid amount of Rs.12,67,340.05 be paid to the applicant forthwith. A week thereafter, again, a letter was sent on 23rd January, 2004, in which reference of the letter dated 17th January, 2004 was given and mentioned that the respondents have failed and neglected to enter upon reference in respect of the dispute of non-payment of dues with interest on the subject-matter, i.e., construction of Engine Run-up Bay at NEC and construction of New Apron at NEC. In this letter (Exhibit 'J'), the applicant has named three arbitrators, and submitted that one of them be appointed as the sole arbitrator. That prayer of the applicant is not in consonance with the agreement.

7. The applicant submits that the respondents failed to appoint an arbitrator within the notified period by the applicant, and the applicant is left with no option but to file the present application under Section 11 of the Arbitration and Conciliation Act, 1996.

8. It may be pertinent to set out Clause 57 of the tender hereinbelow:-

> “Except where otherwise provided for in the contract all

questions, disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof shall be referred to the sole arbitration of the Managing Director, Indian Airlines Ltd., New Delhi, and if the Managing Director is unable or unwilling to act as such arbitrator, there will be no objection if the arbitrator so appointed is an employee of Indian Airlines Ltd. and that he had to deal with the matters to which the contract relates and in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Managing Director as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Managing Director, Indian Airlines Ltd., New Delhi, as aforesaid should act as arbitrator and if for any reason, that is not possible, the mater is not to be referred to arbitration at all. In cases where the amount of the claim in dispute is Rs.50,000 (Rupees fifty thousand) and above, the arbitrator shall give reasons for the award.

Subject as aforesaid provision of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause. It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts

claimed in respect of each such dispute. The arbitrator(s) may from time to time with the consent of the parties enlarge the time, for making and publishing the award.

The work under the Contract shall, if reasonably possible, continue during the arbitration proceeding and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the final hearing.

The arbitrator shall give separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

The award of the arbitration shall be final, conclusive and binding on all parties to this contract. ”

9. The applicant submits that vide letter dated 12th May, 2003 addressed to the Regional Director (W.R.), the applicant requested to look into the matter and make balance payment. It is also mentioned that the reminder was sent by the applicant. The respondents addressed a letter on 9th June, 2003, and requested the applicant to submit certain document pertaining to order/letter from the Regional Director, advising the applicant to execute some extra work / additional work over and above the contract amount in variation of 10% of the tender cost. The applicant, vide letter dated 16th June, 2003, replied to the

said query raised by respondent No. 2, Senior Manager (Civil), Indian Airlines, and requested to settle the final bill. It is also mentioned in letter dated 17th January, 2004 of the applicant that since no payment was forthcoming, the applicant was left with no option but to invoke the arbitration clause, viz., Clause 57 of the tender, and called upon respondent No. 1, the Managing Director, Indian Airlines, who is the named Sole Arbitrator, to settle the dispute under Clause 67 in the proceedings set out above.

10. It is also alleged by the applicant that despite the letter dated 17th January, 2004, the Managing Director, Indian Airlines, has not entered upon the reference to arbitration to settle the dispute.

11. The applicant sent another letter on 23rd January, 2004, and once again, called upon respondent No. 1 to select the Sole Arbitrator from the Panel of Arbitrators provided in Exhibit 'J'.

12. The applicant submits that he called upon respondent No. 1 to select the Sole Arbitrator within the notified period, but respondent No. 1 did not do so. Therefore, the applicant was left with no option but to file this application under Section 11 of the Arbitration and Conciliation

Act, 1996 on 26th February, 2004.

13. A reply-affidavit has been filed on behalf of respondent No. 2. It was mentioned that the present application has become infructuous, as the Managing Director of Indian Airlines Ltd. has, by his Order dated 29th April, 2004, appointed an Arbitrator, viz., S.K Ghorai, Regional Director of Indian Airlines Ltd., Western Region, Mumbai. It is mentioned in the reply that since the applicant's application is for appointment of the Sole Arbitrator by this Court, and is based on the alleged failure of respondent No. 1 to appoint an arbitrator, the applicant has now no cause of action and the present arbitration application be dismissed.

14. It is mentioned that a copy of the order was sent to the applicant. It is also mentioned that in view of the pendency of the present application, the Managing Director of Indian Airlines ought not to have appointed the Arbitrator. Passing of the order after the application is filed by the applicant is not justified, and the appointment of the Arbitrator by respondent No. 1 be set aside.

15. The learned counsel for the respondents placed reliance on the

judgment of the Apex Court in *Datar Switchgears Ltd. V. Tata Finance Ltd. & Anr.* [2000 AIR SCW 3925]. In this case, Their Lordships of the Apex Court observed as under:-

> "So far as Section 11(6) [of the Arbitration and Conciliation Act, 1996] is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but *before the first party has moved the Court under Section 11*, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of the demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

In view of the decision of the Apex Court, though the respondents could not appoint an arbitrator within the stipulated period of 30 days, the Apex Court held that the right to appoint an arbitrator under Section 11(6) is not forfeited.

16. In this case, the appointment of the Arbitrator by the Managing

Director of the Indian Airlines was made on 29th April, 2004, whereas this application has been filed before this Court with the request to appoint the Arbitrator on 26th February, 2004.

17. In view of the judgment of the Apex Court, the order passed by the Managing Director, Indian Airlines, appointing the Arbitrator under Clause 57 of the contract, being contrary to the law of the land, consequently, is accordingly set aide.

18. Since quite some time has been lost in these judicial proceedings, therefore, in the facts and circumstances of this case, I deem it appropriate to appoint Dr. Justice B.P. Saraf, a retired Judge of the Jammu & Kashmir High Court, as the Arbitrator. To avoid further delay, I direct the parties to appear before His lordship on 6th August, 2005 or on any other subsequent date given by the learned Arbitrator.

19. This application is accordingly disposed of.

CHIEF JUSTICE